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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-758

ROY VROOM,
Petitioner,

VERSUS

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HELMICK, CONOVER & BURKHARDT

FREDERIC K. CONOVER II

700 Denver Club Building
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October, 1973

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. ---------

ROY VROOM,
Petitioner,

VERSUS

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Roy Vroom respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on June 29, 1973.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. The appeal was a consolidation of two

appeals, one appealing from a final judgment initially entered in the United States District Court on May 11, 1972 and the other appealing from an order of the District Court entered on November 21, 1972 and denying a motion filed under Rule 60 (b) (5) of the Federal Rules of Civil Procedure to obtain relief from the judgment. The opinion of the United States District Court for Colorado appears at 342 F.Supp. 687 (D.Colo. 1972). The order of the United States District Court for Colorado entered on November 21, 1972 denying the Rule 60(b) (5) motion also appears in the appendix hereto.

JURISDICTION

The date of the judgment sought to be reviewed and the date of its entry is June 29, 1973. An order denying the rehearing was entered on August 17, 1973. This Court's jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

The U. S. District Court's judgment impressed a constructive trust upon certain shares of common stock owned by petitioner. However, the judgment also expressly conditioned the impression of the trust upon the tender of payment by respondents of the price of the stock within 30 days from the date the judgment became final. It was further decreed that if the tender was not so made the trust was released. Respondents failed to tender payment for at least 190 days after the judgment was entered. The District Court then refused to satisfy the

judgment on the grounds alleged by petitioner that the judgment and decree had been fully complied with by reason of the expiration of the 30 day period. The District Court ruled that it had been its intention that the constructive trust be imposed until 30 days after the judgment or order of the final court to which an appeal is taken. The Court of Appeals affirmed.

The questions then presented are:

1. Whether a judgment of a United States District Court becomes final for purposes of execution and enforcement ten days after its entry under Rule 62 of the Federal Rules of Civil Procedure if no supersedeas bond is filed, when the Court's judgment required Plaintiffs to tender payment for stock within thirty days from the date judgment became final.

2. Whether a United States District Court has the jurisdiction or power to modify the effect of its own judgment after the judgment has been automatically satisfied by its own terms.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Rule 62, Federal Rules of Civil Procedure. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Exceptions —Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its en-

try. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 69 (a), Federal Rules of Civil Procedure. Execution. In General.

(a) *In General.* Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the

judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Rule 70, Federal Rules of Civil Procedure. Judgment for Specific Acts; Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

STATEMENT OF THE CASE

Suit in this matter was brought in March 1971 to impress a constructive trust upon certain shares of stock in West End Development Company which had been purchased by petitioner Roy Vroom from former stockholders of the company. Respondents contended that the purchase by Vroom violated certain provisions of the corporation's Articles of Incorporation pertaining to restrictions on transfer.

The District Court impressed a constructive trust upon the shares of stock which were purchased by petitioner Roy Vroom, but the trust so impressed was conditioned upon the tender of payment of the price of the stock by respondents within thirty days from the date the judgment became final. It was further decreed that, if the tender was not made within that period of time, the trust was released.

The District Court's judgment and decree was signed and entered on the docket on May 11, 1972. The automatic stay of execution provided for under Rule 62 of the Federal Rules of Civil Procedure expired on May 21, 1972. Thereafter, none of the respondents made a tender of payment of the price of the stock. Petitioner, on November 6, 1972, filed a motion under Rule 60 (b) (5) of the Federal Rules of Civil Procedure for an order granting relief from the District Court's final judgment on the grounds that the judgment and decree with respect to the constructive trust had been fully complied with by the parties. Petitioner maintained that no tender had been made within thirty days from the date judgment

became final, that the constructive trust had thereby been released and that there had, accordingly, been a satisfaction of that judgment which had impressed the constructive trust upon petitioner's shares. The District Court held a hearing on this Rule 60 (b) (5) motion on November 20, 1972 and denied the motion. The District Court on November 20, 1972 contended that it had been its "intention" in May 1972 to impose a constructive trust "until thirty days after the judgment of or order of the final court to which an appeal is taken."

The denial of petitioner's Rule 60 (b) (5) motion was appealed to the Tenth Circuit Court of Appeals and the Court of Appeals upheld the ruling of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case raises an important question of interpretation of the Federal Rules of Civil Procedure. "The importance of the question in the administration of the Federal Rules of Civil Procedure," in conjunction with uncertainty among the courts of appeals, has been held sufficient reason for granting a writ of certiorari [Rule 53 (b)] *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed.2d 290, rehearing denied, 352 U.S. 1019, 77 S. Ct. 553, 1 L. Ed.2d 560. See also *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed.2d 721 (1958), [Rule 58 and former Rule 73 (a)] where "public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from judgments of District Court ac-

tions for money only tried without a jury" was held ample grounds for certiorari.

In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed.2d 1255 (1958), an important question as to the proper application of the Federal Rules of Civil Procedure was raised when the issue of whether a district court exceeded its power to dismiss a lawsuit under Rule 37 (b) of the Federal Rules of Civil Procedure was presented. Similarly, in this case, the issue of a district court's exceeding its own power by attempting to modify an earlier judgment is presented. Also see *Sears, Roebuck and Co. v. Mackey,* 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) where certiorari was granted to resolve a question as to finality and appealability of judgments under Rule 54 (b) of the Federal Rules of Civil Procedure.

2. The Tenth Circuit decision in the instant case is in conflict with previous decisions of the Fifth and Seventh Circuits. See *Sirloin Room, Inc. v. American Employers Insurance Co.,* 360 F.2d 160 (5th Cir. 1966) and *In Re Federal Facilities Realty Trust,* 227 F.2d 651 (7th Cir. 1955) both of which hold that judgment becomes final under Rule 62 (d) and former Rule 73 (d) of the Federal Rules of Civil Procedure for purposes of execution or enforcement of a judgment ten days after entry if no supersedeas is given.

3. While there are many pronouncements by the Supreme Court on the issue of "finality" for appeal or *res judicata,* the court has not spoken explicitly on the issue

of finality for execution and performance since *Hovey v. McDonald,* 109 U.S. 150 (1883), which pre-dates the present Federal Rules of Civil Procedure. The answer to this important question is currently uncertain and a Supreme Court ruling could instantly illuminate.

4. The Tenth Circuit ruling relies upon authority which deals with the issue of finality of judgments not for purposes of enforcement or execution but rather for purposes of appealability. 4 Am. Jur.2d *Appeal & Error,* § 363; *First National Bank of Dodge City v. Johnson County National Bank and Trust Company,* 331 F.2d 325 (10th Cir. 1964); *Weingartner v. Union Oil Company of California,* 431 F.2d 26 (9th Cir. 1970), cert. denied 400 U.S. 1000 (1970). The ruling, accordingly, misinterprets the (applicable) law, departs from accepted standards for judicial proceedings and seriously hinders the future administration of the law with respect to the enforcement of final judgments in federal court. Federal Rules of Civil Procedure 62, 69 and 70; *Heikkila v. Barber,* 164 F.Supp. 587 (N.D.Calif. 1958); *Van Huss v. Landsberg,* 262 F.Supp. 867 (W.D.Mo. 1967); *Marceletti and Son Construction Company v. Millcreek Township Sewer Authority,* 313 F.Supp. 920 (W.D. Pa., 1970).

5. Finally, neither the Court of Appeals nor the District Court applied the provisions of Rule 62 of the Federal Rules of Civil Procedure when such application was clearly warranted. This action so far departs from the accepted and usual course of judicial procedure as to warrant exercise of Supreme Court supervisory powers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

May 12, 1972

Marguerite IRWIN et al.,
Plaintiffs,

v.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, et al.
Defendants.

As Amended on Denial of Rehearing June 23, 1972

Shellman, Carney & Edwards, by Dwight K. Shellman, Jr., and William J. Carney, Aspen, Colo., for plaintiffs

Helmick, Conover & Burkhardt, by Frederic K. Conover, II, and Kenneth L. Keene, Jr., Denver, Colo., for defendants.

MEMORANDUM OPINION

WINNER, District Judge.

[APPENDIX]

The individual plaintiffs, all of whom are citizens of states other than Colorado, and all of whom are retired or soon to be retired Army nurses, are minority stockholders in West End Development Company, a Colorado corporation. They seek to enforce against Roy Vroom, a Colorado citizen, rights to purchase stock in that company worth more than $10,000.00. As stockholders, they bring a derivative action against Roy Vroom as president, director and dominant stockholder of the company to force him to repay a $15,000.00 salary to the company, and they ask other derivative relief to be discussed later. The story unfolds.[1]

In 1957, Marguerite Irwin and Ada Rock[2] came to Aspen on a vacation, and they looked into the possibility of purchasing a small lodge in the area to operate after their retirement from the Army. Defendant Roy Vroom (in partnership with his brother, Jacob Vroom) maintained a real estate office in Aspen, and the two visiting Army nurses chanced into the Vroom real estate office to inquire about the availability of a lodge which they might buy. Vroom touted them into a joint venture with his brother and himself to purchase about 30 acres of undeveloped real estate just outside Aspen. The land was bought from Friedl Pfeiffer for $45,000.00, with $18,000 to be paid at time of purchase and the balance to be paid over a ten year period. One-half of the downpayment was

1. Facts and conclusions contained in this opinion are facts found and conclusions made by the Court pursuant to the requirements of Rule 52.

2. Ada Rock is not a party to this case, presumably for the reason that she is a Colorado citizen, and her presence would destroy diversity of citizenship. She has a case pending in a Colorado state court.

to be put up by Marguerite Irwin, Ada Rock and June M. Lease, and the other half was to be paid by Vroom Realty and Theodore Gordon, but the total payments to be made by Vroom Realty and Gordon were $18,000.00 each. The interests were to be held:

Irwin,Rock and Lease, collectively	20%
Vroom Realty	40%
Gordon	40%

To come up with $7,500 of their $9,000.00 share of the downpayment, with prior approval of the other investors being obtained, Vroom Realty and Gordon sold a 5% interest to Julia Crowley (nee Graves) and another 5% interest to Lois McCaleb.

A joint venture or syndicate agreement was entered into which provided in material part:

> "No party may sell or assign his interest herein or any fractional portion thereof without first offering his interest or fractional portion to the other parties, in writing, and allowing them, or any one of them, 15 days to meet his price, in cash, the name of the proposed purchaser being disclosed. No party shall thereafter sell his interest or any fractional portion thereof to anyone at less than the above offered price. Otherwise the interests or any fractional portion thereof shall be freely assignable."

Prior to consummation of the the purchase of the land, Vroom Realty assigned 10% of the deal to Ewing R. Taylor, Jr. and his wife, Ann Turlock Taylor, for $10,000.00, and again, notices were sent to the other investors in accordance with the quoted provision of the

syndicate agreement. In 1960, Vroom Realty borrowed $8,000.00 from Mr. and Mrs. Taylor and a 10% interest in the syndicate was put up as collateral for the loan. When the loan was not repaid, an outright conveyance of the pledged 10% interest was made to the Taylors.

In 1961, a disagreement arose between the Vrooms and Gordon, and Roy Vroom recommended to the other investors that an informal partition of the property be approved. At that time, Gordon owned a 35% interest in the venture [his original 40% less his share of the interest sold to Crowley and McCaleb.] By his letter of March 9, 1961, Roy Vroom told the other investors of the dispute and of his recommendations. He said:

> "As we (my brother and I) have declared in the past, we have pledged to advise you of any significant development effecting the property. (sic) In the interest of unanimity we would appreciate your approval by signing and returning this letter to my office."

All of the investors approved, and 10 and a fraction acres were conveyed to Gordon to terminate his relationship with the venture.

At about this time, the partnership of Roy Vroom and Jacob Vroom came to an end, and in 1962, the Vroom Realty interest in the venture was transferred to Roy Vroom in settlement of the partnership accounts. No notice of this transfer was given to the other investors. This was at about the same time that Roy Vroom's then attorneys were worried about title problems in event of a sale of the real estate owned by the joint venture, and

they recommended that the syndicate be incorporated to permit easier conveyance of marketable title. All participants in the venture approved this recommendation, and West End Development Company was incorporated on August 21, 1963, to take over for the joint venture, with stock being issued in accordance with the individuals' percentage ownership of the syndicate. As will be seen before this opinion is concluded, three paragraphs of the Articles of Incorporation are of importance to the resolution of this lawsuit.

The objects and purposes of the corporation are set forth in Article III, Paragraph I:

> "To engage in and carry on the business of buying, leasing or otherwise acquiring real estate of every kind and description, to construct and erect, or contract for the construction or erection of buildings and structures in or upon any of said real estate for any uses and purposes; to own, hold, improve, develop, subdivide, maintain, operate, lease, sell or otherwise dispose of all or any of said real estate or any part thereof."

The restrictions on transfer (which Vroom testified in the course of his deposition received in evidence were intended to restate the restrictions contained in the joint venture agreement) appear in Article IV, paragraph 6:

> "No shareholder shall sell or transfer any outstanding shares of the capital stock issued by the corporation to such shareholder, excepting to the other shareholders, *in the proportion which the number of shares owned by each bears to the total shares out-*

standing, without the prior consent of the owners of at least two-thirds (2/3) of the shares entitled to vote at shareholders' meetings, subject, however, to Paragraph 7 of this Article." [Emphasis supplied]

Article VIII, Paragraph 1 has to do with contracts between the corporation and its officers or directors. It says:

"No contract or other transaction of the corporation with any other person, firm or corporation, or in which this corporation may be interested, shall be affected or invalidated by:

"(a) the fact that any one or more of the directors or officers of this corporation may be interested in, or is a director or officer of, any other corporation; or

"(b) the fact that any director or officer, individually or jointly with others, may be a party to, or may be interested in, any such contract or transaction. Each person who may become a director or officer of the corporation is hereby relieved from any liability that might otherwise arise by reason of his contracting with the corporation for the benefit of himself or any firm or corporation in which he may in any way be interested."

[1] Read literally, Article IV, Paragraph 6 of the Articles having to do with the sale of shares in the corporation is nonsensical. It says that the other shareholders have a right to share in the purchase of a selling

stockholder's stock "in the proportion which the number of shares owned by each *bears to the total shares outstanding.*" The impossibility of giving literal application to this provision may be illustrated by assuming a corporation with 100 shares outstanding owned 30 shares by A, 25 shares by B, 20 shares by C, 15 shares by D and 10 shares by E. If A wanted to sell his 30 shares, B would have a right to buy 7.5 shares, C would have a right to 6 shares, D could buy 4.5 shares and E could buy 3 shares —a total of 21 shares, and 9 shares would be left out in space. Obviously, the scrivener who drafted the articles meant to say "in the proportion which the number of shares owned by each *bears to the total shares not offered for sale.*" A court must interpret the articles in a way which will give them a reasonable meaning, and defendant Vroom testified that it was intended in the articles to carry forward the provisions of the syndicate agreement which made provisions for a workable result and for the result necessarily intended by the draftsman of the corporate articles.

With this interruption in our story we return to develop the facts occurring after incorporation of the venture. The Buttermilk ski area was started near the land, and it, coupled with the public's enthusiasm for skiing, caused the value of the land to skyrocket. Vroom, who was well aware of the land's value, made some attempt to buy the nurses' stock for $600 per share in 1965, and for $750 a share in 1967. The nurses had no knowledge of Aspen real estate values because their professional status resulted in duty assignments throughout the world, and they relied on and trusted Vroom to

manage the property and to advise them concerning its development or disposition. [Vroom freely admitted plaintiffs' trust and reliance on him.] Yet, although Vroom had suggested a $600 per share price to the uninformed, far distant nurses in 1965, on September 9 of that same year, he purchased the 30.76 shares owned by the Taylors for $31,536.00—a price per share of $1,025.22. The nurses were not notified of this purchase, and they were given no opportunity to participate therein. Vroom's explanation of his failure to tell them about the transaction was that he had never read the articles of incorporation. This explanation hardly comports with the notices he gave during the life of the syndicate and his admission that Article IV, Paragraph 6 of the Articles of Incorporation were intended to carry forward the provisions of the joint venture agreement. Nor is it easy to accept in light of his present insistence on literal enforcement of other provisions of the articles. His advice to plaintiff Lease two years later that her stock was then worth only $750.00 per share does little to add credence to Vroom's claims, and it is apparent that he not only did not give plaintiffs an opportunity to share in the purchase of the Taylor stock, but that he consciously concealed that stock purchase from them.

On August 22, 1967, Vroom wrote the nurses calling a special stockholders' meeting for September 6, 1967. In his letter he said that he wanted to develop a small portion of the company land as "a recreational facility consisting of tennis courts, swimming pools, club house, restaurants and related facilities." He assured them that "the property would be leased to either a group, who

would then finance and develop the facility, or to an individual such as myself . . . Of course, the property will be leased, based on a percentage of the current value of the property." It comes as no surprise to learn that none of the plaintiffs were able to leave their duty stations to attend the meeting, although Ada Rock did manage to be present. The minutes of meeting show nothing concerning details of the plan but they recite that "All parties were in accord with the proposed project and it was agreed that we would proceed as soon as the various details were finalized."

In 1968, Vroom's former attorneys resigned as directors of the company, and defendants Sabin and Powers, both employees of Vroom, replaced them as directors. The extent of Sabin's and Powers' knowledge of and participation in company affairs is dubious to say the least. Nothing much happened until April 15, 1969, when Vroom wrote the other stockholders saying that he was negotiating a sale or a lease for the development "of the acreage owned by West End Development Company." He said that there were three possibilities, (a) a sale of the land, (b) a lease of the land, or (c) a participation in the development whereby the company would contribute the land as its share of the development cost. Enclosed with this letter was a consent to be signed by the stockholders, but their consents were not forthcoming.

Vroom did negotiate with one David Hoffman to form a limited partnership to develop the entire property, and a draft of the proposed limited partnership agreement was drawn. It said that the entire property was to be developed as "a tennis and swim club, retail shop-

ping mall and residential community." The recited agreed value of the real estate was $30,000 per acre, and, although Vroom was at all times willing to sign the agreement, the deal fell through when Hoffman lost interest. Vroom was an avid tennis enthusiast who played four or five days a week, and his desires to play tennis were not to be frustrated by either Hoffman's loss of interest, the corporation's lack of money, or the nurses' failure to approve the plan. Accordingly, on June 4, 1969, the board of directors authorized "the West End Development Co. to proceed with the construction of a Tennis and Swim Club." The resolution provided:

> "... the funds necessary for the initial phases would be advanced by Roy Vroom, personally, until such time as other satisfactory arrangements can be made by financing through a lending institution or until the West End Development property is sold, leased, or a participation arrangement is made whereby West End Development Co. participates with a developer. At that time, Roy Vroom will be reimbursed, in full, together with interest at bank rates. *Should West End Development Co. elect to operate said facilities, in that event Roy Vroom will be reimbursed from the gross income derived from said operation,* prior to any distribution of profits or dividends made to the stockholders of the West End Development Co., plus interest . . . It was further agreed to renew the Exclusive Listing Agreement with Roy Vroom Realty." [Emphasis supplied]

Work on the tennis courts started and Vroom loaned

the corporation $39,216.91. The economic study to support the expenditure deserves quotation from the portion of Vroom's deposition offered by defendant:

"Q. Did you inquire into the economics of the tennis operations that were in existence in Aspen at that time"

"A. No.

"Q. Did you inquire into the economics of tennis clubs generally?

"A. Not specifically, any specific tennis club, per se. I had an idea of what they cost to build, and approximately how much income they would produce.

"Q. Where did you get those ideas?

"A. From what I had to pay for a tennis court to play on it, and from people that built tennis courts in the past as to what they paid for them.

"Q. People in the Aspen area who had built tennis courts?

"A. No, in Denver."

Testimony at time of trial demonstrated that the income projections were little more than doodling, and predictably, the tennis courts have lost money under the operation of West End Development Company. Of course, the resolution of June 4, 1969, said that if the company operated the courts, "Vroom will be reimbursed from the gross income derived from said operation," but that isn't the way it has worked out. Less than four mon-

ths after the June 4, 1969, resolution, another resolution signed by Vroom as president and Powers as secretary [Sabin did not sign these minutes] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security. The resolution said that "the purpose of the loan is to reimburse Roy Vroom for the advance of funds made by him to West End Development Company, plus interest at 9% per annum. Any funds remaining after Roy Vroom is paid in full will be used to improve the tennis club site further."

To the extent that the resolution commanded the repayment of Vroom's loan plus 9% interest, it was carried out, and Vroom was paid $42,345.15. [$39,216.81 principal plus $3,128.24 interest.] Not all of the remaining loan proceeds of $32,654.85 can be said to have been "used to improve the tennis club site further," because on March 23, 1970, Vroom and Powers voted [Sabin did not sign the minutes] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, and this by a corporation which was losing money according to its financial records and tax returns. The minutes of this meeting show that Vroom was paid, "as manager of the West End Development Company, Inc. affairs and the Aspen Racquet Club." It was agreed that "a salary of $15,000.00 per year be paid to Director Roy Vroom, *which salary shall be increased from time to time as the duties connected with the companies' activities increase.*" [The emphasis is added to emphasize that the company's ability to pay was the farthest thing from

Vroom's mind.] Of course, the nurses knew nothing of these shenanigans.

We backtrack a little in the telling of this sordid tale. By the spring of 1969, the nurses were becoming disenchanted with Vroom's lack of progress in selling the property and with the total absence of income being derived from their by then 12-year old investment. His reports to them over the years had been sporadic and uninformative, and Marguerite Irwin met Ada Rock in Aspen for the avowed purpose of employing an attorney to look into the matter and to find out what had been going on and to obtain legal advice as to what they could and should do. Although plaintiffs' professional skill is attested by the fact that no plaintiff is retiring from the Army at a rank lower than major, their continuing lack of business acumen is attested by a visit they made to Vroom's office before they consulted an attorney. He assured them that all was in order, and he persuaded them that because Aspen is a small town in which gossip travels rapidly, they should not talk to an Aspen attorney. [Vroom told them that such gossip would lessen the land's sales price.] Instead, and still innocently acting on their misplaced trust in Vroom, they followed his recommendation and consulted the Denver attorneys for West End Development Company. Those attorneys conferred with Irwin and Rock, and a member of the firm accepted appointment under a power of attorney which, among other things, said that he should do anything "required or desirable in connection with the following matters:

"1. The interpretation, enforcement, amendment,

modification, termination or cancellation of any agreements, rights or obligations which the said Marguerite Irwin may now or hereafter have relating to her interest in shares of stock in West End Development Co. . . ."

Identical powers of attorney were executed by all of the nurses and accepted by the attorney. Plaintiffs did not know the difference between an attorney in fact and an attorney at law, and they relied on the attorney as their attorney at law to protect their interests. Counsel for defendants have said that they did not think that they were acting as attorneys at law, and that the document was executed to facilitate a transfer of the nurses' stock in event of a sale of the corporation. The power of attorney does say that the attorney can do anything in connection with "the signing, making, executing, and delivering of all documents and matters in connection with the shares of stock owned by (the named nurse) in the said West End Development Co. and any interests which she may have or acquire in and to the assets of said corporation," but, although each nurse delivered her stock certificate to the attorney, none of the stock certificates were endorsed.

[2] Whatever may have been the technical legal status of the attorney, one thing is abundantly clear. The attorney had the power [if not the duty] to enforce any agreement the nurses had relating to their interests in shares of stock of West End Development Co. This the attorney selected by plaintiffs in reliance on Vroom's recommendation did not do, and it comes with poor grace for Vroom to say that plaintiffs' claims now are barred by a statute of limitations which defense, even under

Vroom's view of the facts, would not have been available if the attorney presently asserting that defense had acted.[3]

Totally apart from any claim of a defense of the statute of limitations, the record reflects that during the life of the power of attorney, plaintiffs and the attorney received a most unusual financial statement from Vroom supposedly setting forth the financial affairs of the company. The transmittal letter is dated April 8, 1970, and, although this was subsequent to the authorization of the $15,000.00 salary to Vroom, retroactive to March, 1969, no mention is made of that salary. This statement is remarkable in many respects, but perhaps most noteworthy is its treatment of the value of the land. Rental income from the land (there were some old improvements on it and it had been rented for grazing) is treated as a deduction from the value of the land. No question was raised by the attorney in fact then supposedly representing plaintiffs concerning the unusual accounting methods disclosed in the financial statement.

Finally, plaintiff did consult another attorney, and this lawsuit was filed March 1, 1971.

According to the company's records, after the partition of the land taken by Gordon, after the dissolution of Vroom Realty, and before the Taylor transaction, the

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3. Although we later find that plaintiffs' suit was timely filed, defendant would be estopped to count as part of the time period the year during which his personally selected attorney for plaintiffs failed to act. Johnson v. Neel, (1951) 123 Colo. 377, 229 P.2d 939, infra; General Accident Fire and Life Assurance Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862; Mabray v. Williams, 132 Colo. 523, 291 P.2d 677; Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008; Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725.

number of shares of stock held by each stockholder was:

Ann Taylor	15.38
Ewing Taylor	15.38
Roy Vroom	23.08
Marguerite Irwin	10.253
June Lease	10.253
Ada Rock	10.253
Julia Crowley	7.69
Lois McCaleb	7.69
Total Shares	99.979

[3, 4] Plaintiffs assert a right to a pro rata purchase of the 30.76 shares involved in the Taylor acquisition by Vroom and in the stock of Vroom Realty set over to Roy Vroom on dissolution of the partnership. We reject plaintiffs' contention as to the Vroom Realty stock for the reasons that we do not believe that either the syndicate agreement or the articles of incorporation contemplated that a settlement of partnership accounts on dissolution required an offering of the stock to other stockholders. Both the syndicate agreement and the articles refer to a sale, and counsel freely acknowledged at time of trial that the agreement would not cover an inheritance. We recognize that a debt from Jacob Vroom to the partnership was forgiven as a part of the transaction, but the transfer from Vroom Realty, a partnership, to Roy Vroom, a partner, was not a sale when that transfer was accomplished as a part of the partnership's dissolution and settlement of the partners' accounts. Moreover, any claim plaintiffs might have to share in this 10-year old partnership distribution of stock is barred under applicable Colorado statutes of limitation.

[5] In considering the statute of limitations defense interposed by defendant to plaintiffs' claim of a right to share in the Vroom Realty stock and the Taylor stock, there are three statutes which may possibly apply: (1) 1963 C.R.S. 87-1-11 is a six year statute applicable to contract actions; (2) 1963 C.R.S. 87-1-10 is a three year statute running from discovery, and it is made applicable to bills of relief on grounds of fraud and (3) 1963 C.R.S. 87-1-15 is a five year statute made applicable to "Bills of relief, in case of the existence of a trust not cognizable by courts of common law." The parties both say and the Court agrees that the five year statute is applicable. Farris v. Wirt (1901) 16 Colo.App. 1, 63 P.946.

[6] As we have earlier noted, the claim to share in the Vroom Realty stock is barred under any of the statutes which have been listed. However, when we come to the purchase by Roy Vroom of the Taylor stock, we have a different situation. The contract of purchase was dated September 9, 1965, and suit was filed March 1, 1971. However, Vroom did not receive the Taylor stock until a time well within either statutory period. Accordingly, neither the five nor the six year statute bar the action, and the case would not be barred under the three year statute because as to the Taylor sale to Roy Vroom, plaintiffs did not have knowledge of the sale, nor did they have knowledge of facts which would put a reasonable person on notice. Moreover, our later discussions of estoppel and breach of fiduciary duty apply to the limitations defense.

In seeking to resist the imposition of a trust on a portion of the Taylor stock, defendant falls back on two

more lines of defense. He says, (a) that restrictions on the sale of stock are against public policy and void; (b) that the Colorado stock transfer act required that the certificate itself show the restriction, and that absent such legend on the stock certificate, the stock could be freely bought and sold.

[7] Reasonable restrictions on the sale of corporation stock are not against public policy and they are not void. Seventy years ago Justice Holmes said in Barrett v. King, 181 Mass. 476, 63 N.E. 934:

> "Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership . . . there seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm."

[8] Colorado has judicially and legislatively approved of restrictions on the sale of stock. Sterling Loan & Inv. Co. v. Litel, 75 Colo. 34, 223 P.753; 1963 C.R.S. 31-3-2 (1) (j). The Congress of the United States, and most recently the United States Supreme Court have approved restrictions on the sale of stock. Affiliated Ute Citizens of Utah et al. v. United States et al., 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 [Decided April 24, 1972] relies on the Congressionally created restrictions. The restrictions here in question are reasonable and they are enforceable unless defendant can prevail on his defense of failure to comply with the provisions of the stock transfer act.

As of September 9, 1965, Colorado law [1963 C.R.S.

31-11-14] provided:

> "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaw of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

[9, 10] As part of Colorado's adoption of the Uniform Commercial Code, this section was repealed in 1965, effective July 1, 1966. The obvious purpose of the section was to make ineffective restrictions on transfers to persons without notice. Had the Taylors sold the stock to innocent purchasers, the notice missing from the stock certificates would have rendered the restriction invalid as to the innocent purchaser, but no notice is better than actual knowledge, and Vroom is charged with actual knowledge of the restriction. He signed the joint venture agreement. He gave notice under the joint venture agreement. He testified that the articles of incorporation were intended to carry forward the restrictions contained in the joint venture agreement. He signed the articles of incorporation, although he claims not to have read them. On November 1, 1963, he signed the Taylor stock certificates as president and he owed a duty to see to it that the restriction was placed on those certificates. He consciously concealed his purchase of the Taylor stock from plaintiffs. He cannot take advantage of his own wrongs to further injure the stockholders as to whom he occupied a fiduciary relationship. Sankin v. 5410 Connecticut Ave.

Corp. (1968) (D.C.D.C.) 281 F.Supp. 524; Baumohl v. Goldstein (1924) 95 N.J.Eq. 597, 124 A. 118. Had the Uniform Commercial Code been in effect in 1965, instead of in 1966, there would be no argument available to defendant. 1963 C.R.S. 155-8-204, which replaced 1963 C.R.S. 31-11-14, expressly says:

> "Unless noted conspicuously on the security, a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective *except against a person with actual knowledge of it.*" [Emphasis supplied]

[11] The new statute represented a change in phraseology, but not in the practical effect of the statute. Age Publishing Co. v. Becker (1943) 110 Colo. 319, 134 P.2d 205 must be read to say that on the facts here present, the failure to note the restriction on the certificates is no bar to its enforcement against Roy Vroom who had actual notice of it. And all else aside Roy Vroom is estopped from setting up the absence of the restriction from the face of the stock certificate as a defense. Colorado law of estoppel applies. Liberty National Bank & Trust Company v. Bank of America National Trust & Savings Association (1955) (10 Cir.) 218 F.2d 831. Colorado has gone far in applying the law of estoppel. In Johnson v. Neel (1951) 123 Colo. 377, 229 P.2d 939, it was said:

> "We are of the opinion that under the peculiar facts of this case the doctrine of estoppel in pais is applicable and controlling. This doctrine is founded upon principles of fair dealing and is designed to aid the law in the administration of justice where with-

out its aid, injustice might result. In 19 American Jurisprudence, page 640, we find the following statement: 'Generally speaking, however, equitable estoppel is a rule of justice which in its proper field prevails over all other rules.' *The doctrine of equitable estoppel has been invoked to cut off rights or privileges conferred by statute, and constitutional rights may be effectively waived by conduct consisting of action or failure to act.* (citations omitted) 'A statute cannot stand in the way of waiver or equitable estoppel when the facts der and their application in the interest of justice and right.' Kalloch v. Elward, [118 Me. 346, 108 A. 256]."

Other Colorado cases which require that defendant be estopped from asserting this defense are, General Accident Fire & Life Assur. Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862; Mabray v. Williams, 132 Colo. 523, 291 P.2d 677; Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008, and Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725. Roy Vroom the president, a director and the trusted manager of West End Development Company was a fiduciary as to the other stockholders. Homestake Mining Co. v. Mid-Continent Exploration Co. (1960, 10 Cir.) 282 F.2d 787; Herald Co. v. Bonfils (1970, D.C.Colo.) 315 F.Supp. 497; Hudson v. American Founders Life Ins. Co. (1963) 151 Colo. 54, 377 P.2d 391, and United States v. Gates (1967, 10 Cir.) 376 F.2d 65. He breached his contractual and his fiduciary duties to plaintiffs when he purchased the Taylor stock without honoring the agreement he had made to permit the other stockholders to share in the purchase. They are entitled

to share in that purchase at the price Roy Vroom paid, and a constructive trust is imposed on the 30.76 shares of stock purchased by Roy Vroom from Ewing and Ann Taylor.

The arithmetic of the constructive trust works out as follows:

Stockholder	*Shares owned divided by total outstanding less Taylor stock.*	*Percentage of shares outstanding less Taylor.*	*Shares of Taylor stock to which each stockholder is entitled.*
Vroom	23.08/69.219	33.34	10.2553
Irwin	10.253/69.219	14.81	4.5555
Lease	10.253/69.219	14.81	4.5555
Rock	10.253/69.219	14.81	4.5555
McCaleb	7.690/69.219	11.115	3.4191
Crowley	7.690/69.219	11.115	3.4191
		100.	30.76

[12] As has been noted, the purchase price per share of the stock purchased by Vroom from the Taylors was $1,205.22, and the other stockholders are entitled to purchase the shares above indicated from Roy Vroom at that price plus interest at the rate of 6% per annum from September 9, 1965, to the date such purchase is made by the other stockholders.[4] Plaintiffs shall have 30 days from the date judgment in this case becomes final within which to exercise their rights to purchase, and pending the expiration of that 30 day period, the stock which plaintiffs

4. Of course, the Court is without jurisdiction to impress a trust in favor of Ada Rock, but her interests must be taken into account in determining the rights of the stockholders who are before the Court.

are entitled to purchase is impressed with a trust in their favor.[5]

Plaintiffs have not heretofore formally tendered the purchase price to Roy Vroom, but it was implicit in all of the testimony in the case that they were willing to buy the stock at the price they now know was a bargain price. moreover,Vroom testified that he would not have accepted any tender and that he denied that plaintiffs had any right to share in the Taylor stock. Plaintiffs certainly could not be expected to tender their pro rata share of the purchase price while the fact of purchase was being concealed from them by Vroom, and after they found out about the deal, it was manifest that he had planted his feet and that a tender would have been a meaningless act. There was no requirement for tender until Vroom notified plaintiffs that they could share in the purchase, and it has taken this trial to establish plaintiffs' rights.

[13] We pass now to a consideration of the derivative claims. Prefatorily it should be noted that although the complaint may be somewhat defective under Rule 23.1, all pleadings were merged into the pretrial order, and it is abundantly clear from that order and from the conduct of the trial that all parties knew that they were going to trial on the derivative claims. Undeniably, plaintiffs made no demand on Roy Vroom and his personal secretary that the corporation assert these claims, but if ever there were a case in which such a demand would have been futile, this is that case. Judge Doyle

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5. The price to Irwin and Lease is $4,664.75, plus interest, and to McCaleb and Crowley, $3,496.00, plus interest.

discussed the necessity under Rule 23.1 for a futile demand in deHaas v. Empire Petroleum Company (D.C.Colo. 1968) 286 F.Supp. 809, and he held that a demand was not necessary. He said:

> "We conclude that the defendants so dominated American Industries, Inc. that a demand on its board of directors would probably have come to naught: that in the long run it would have been a futile and useless gesture. Since this derivative action is the only effective method of litigating the plaintiffs' claims, the demand requirement of Rule 23.1(2) is excused."

The Tenth Circuit affirmed in deHaas v. Empire Petroleum Company (1970) 435 F.2d 1223, saying:

> "Included among the requirements for pleading a derivative action under Rule 23.1 is the necessity of setting forth the efforts of the plaintiff, or the reasons for making no effort, to obtain intracorporate relief for the action he desires. In the case at bar, plaintiff admittedly made no effort to approach the directors but did set forth reasons for not so doing. The allegations may, of course, become the subject of factual dispute (as here) but the issue remains one for the court and its determination lies within the sound discretion of the court. Courts have generally been lenient in excusing demand. See Meltzer v. Atlantic Research Corp., 4 Cir. 330 F.2d 946
>
> "The trial court here held, prior to trial, that a derivative action was the only effective method of litigating plaintiff's claims and that demand was ex-

cused. We are in complete accord with this ruling for the reasons set forth in the trial court's memorandum decision, 286 F.Supp.809, 813-815, and we find nothing in the trial record that would indicate an abuse of discretion."

Demand is here excused, but we are not out of the woods in our consideration of the derivative claims. Those claims, of course, are claims brought in behalf of a Colorado corporation against a Colorado citizen, and we must think about our jurisdiction to rule on the claims. That we do have jurisdiction to determine the derivative action against Vroom for the recovery of the $15,000.00 paid to him is settled by Smith v. Sperling (1957) 354 U.S. 91, 77 S.Ct. 1112, 1 L. Ed.2d 1205. There, under somewhat similar circumstances the trial court dismissed for want of diversity jurisdiction, and the Supreme Court reversed. It was said:

"The gist of the findings of the District Court is th. t since there was no fraud on the part of the directors in making the contracts but only an exercise of independent business judgment, the management wa: not antagonistic to the financial interest of the corporation. That is an issue that goes to the merits, not to the question of jurisdiction. There will, of course, be antagonism between the stockholder and the management where the dominant officers and directors are guilty of fraud or misdeeds. But wrongdoing in that sense is not the sole measure of antagonism. There is antagonism whenever the management is aligned against the stockholder and defends a course

of conduct which he attacks. The charge normally is cast in terms of fraud, breach of trust, or illegality. . . .

"As the court said in Delaware & Hudson Co. v. Albany & S.R. Co., 213 U.S. 435, 451, [29 S.Ct. 540, 545, 53 L.Ed. 862,] where the management was deemed to be antagonistic to the stockholder 'the attitude of the directors need not be sinister. It may be sincere.' Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure is that of the corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim. . .

"Here it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy. A trial may demonstrate that the stockholder is wrong and the management right. It may show a dispute that lies in the penumbra of business judgment, unaffected by fraud. But that issue goes to the merits, not to jurisdiction. There is jurisdiction if there is real collision between the stockholder and his corporation. That there is such a collision is evident here."

[14, 15] It is settled that where the interests of the citizen corporation are consistent with those of the non-citizen plaintiffs and inconsistent with those of the

citizen defendant, the parties are realigned to accomplish diversity jurisdiction. The corporation is here realigned as a defendant to permit jurisdiction. See, annotation in 68 A.L.R.2d 821, 833, following the report of the decisions in Smith v. Sperling, supra, and Swanson v. Traer (1957) 354 U.S. 114, 77 S.Ct. 1116, 1 L.Ed.2d 1221, and see Judge Doyle's opinion in Dowd v. Front Range Mines, Inc. (D.C.1965) 242 F.Supp. 591. We have jurisdiction to pass upon the self-awarded salary paid to Vroom, and we do so.

[16, 17] It is hornbook law that a director of a corporation stands in a fiduciary relationship with the stockholders,[6] and in light of the inequality of the position of the parties here, Vroom's duties were even greater than those of the usual corporate director, and fraud would be presumed even if the fiduciary status of a person acting as a corporation director were not present. Dittbrenner v. Myerson (1946) 114 Colo. 448, 167 P.2d 15, settled the Colorado law in circumstances of inequality such as we have here. Justice Stone said:

> "In such a situation the facts are amply sufficient to bring the case under the third class of fraud set out by Lord Hardwicke in the classic case of Earl of Chesterfield v. Janssen, 2 Ves.Sr. 125, 155: Fraud '***which may be presumed from the circumstances and condition of the parties contracting: *** to prevent the taking surreptitious advantage of the

6. United States v. Gates (1967 10 Cir.) 376 F.2d 65; Wilshire Oil Co. of Tex. v. Riffe (1967 10 Cir.) 381 F.2d 646; Herald Co. v. Bonfils (1970 D.C.Colo.) 315 F.Supp. 497; Hudson v. American Founders Life Ins. Co. (1963) 151 Colo. 54, 377 P.2d 391; Kullgren v. Navy Gas & Supply Co. (1943) 110 Colo. 454, 135 P.2d 1007.

weakness or necessity of another ***.' The essential condition precedent to the applicability of this doctrine is an 'inequality' between the parties; there must be weakness on the one side and advantage taken of that weakness on the other, and 'It must appear that the dominant party either brought about the unevenness in the conditions, or, finding it ready to his hand, utilized and traded on it to extract from the servient party a gift or contract which he would not otherwise have made.' Bower on Actionable Non-Disclosure, p. 390, § 428. Where such a relation subsists between two persons, "The law presumes in favour of the servient party against the dominant party, (1) that the relation placed the dominant party in a position to exercise influence and dominion over the servient party; (2) that such influence and dominion operated upon, and procured the transaction; and (3), that the influence was an improper and unfair, or (to use the accepted phrase) an "undue influence".' Bower on Actionable Non-Disclosure, p. 363, § 405. '*** when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.' Aylesford v. Morris, 8 Ch.App. 484, quoted in Bower on Actionable Non-Disclosure, p. 391 § 428.

'"The principle on which a court of equity acts in relieving against transactions on the ground of in-

equality of footing between the parties is not confined to cases where a fiduciary relation is shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed.' Sears v. Hicklin, 13 Colo. 143, 148, 21 P. 1022, 1023, quoting from Kerr, Fraud & Mistake 183."

[18] Vroom with the connivance of his personal secretary, voted himself a $15,000.00 retroactive salary to be paid from a loan to the corporation. (He was actually paid $15,048.75) This salary was voted as payment for operating a losing business, and where the money is coming from to pay the bank loan when in a few years the balloon payment provisions of the loan agreement come into play is completely unclear. The June 4, 1969, resolution authorizing construction of the tennis courts itself said that if the company elected to operate the tennis courts, Vroom would be repaid his initial construction loan from the income derived from the tennis-courts, and the resolution authorizing the borrowing from the Bank of Aspen said that the loan's purpose was to repay Vroom, and that "any funds remaining after Roy Vroom is paid in full will be used to improve the tennis club site further." The resolution itself —without reference to its legality or illegality —didn't authorize the expenditure of the borrowed funds to pay Vroom a salary. "Although not necessary to the decision in this case, we comment that unless Vroom can escape under the provisions of Article VII of the Articles of In-

corporation it is doubtful that a quorum of directors voted the salary —at least only Vroom and his secretary signed the minutes —and under general principles of Colorado corporation law, Vroom wasn't eligible to vote." Paxton v. Heron (1907) 41 Colo. 147, 92 P. 15; Steele v. Gold Fissure Gold Mining Co. (1908) 42 Colo. 529, 95 P. 349; Laybourn v. Wrape (1922) 72 Colo. 339, 211 P.367. Moreover, when the salary was to be paid retroactively from borrowed funds for services allegedly rendered to a corporation which was losing money, it is apparent that no thought was given to the corporation's ability to pay as the law demands. Glenmore Distilleries Co. v. Seideman (1967 D.C.N.Y.) 267 F.Supp. 915.

[19] Vroom says that Article VIII of the Articles of Incorporation provide him with an escape hatch from the inevitable cancellation of his otherwise unlawful salary. It does not. It applies, by its terms, to contracts between the corporation and other corporations having common directors and it says:

> "Each person who may become a director or officer of the corporation is hereby relieved from any liability that might otherwise arise by reason of his contracting with the corporation for the benefit of himself or any firm or corporation in which he may in any way be interested."

[20, 21] Read in context, Article VIII was not intended to and it does not apply to salaries voted for himself by a dominant director. And, even if it did, the record establishes that the salary was completely unreasonable under all of the circumstances. Glenmore Dis-

tilleries Co. v. Seideman, *supra.* Exculpatory provisions of corporate articles create no license to steal. They do no more than to validate otherwise invalid agreements if such agreements are shown to be fair. Vroom was not entitled to the salary he voted himself, and he owes it back to West End Development Company plus interest from the date of its unlawful payment to him. No more is Vroom entitled to charge the corporation interest in the amount of $3,128.24 on the loan he made to the corporation which interest he paid to himself when the $39,216.91 loan principal was repaid him from the Bank of Aspen loan. The corporation is entitled to judgment for that amount, again plus interest.

[22] We have not resolved the questions of the corporation's claims for (a) a full accounting from Vroom, and (b) damages which may result from the allegedly improvident investment in tennis courts.[7] We shall not resolve those questions in this lawsuit. It is doubtful that they are included in the issues framed, but, even if they are we doubt our jurisdiction to determine these matters, and the damage question does not appear to be ripe for present decision.

In passing upon the damage claim it would be necessary to determine if the tennis courts represent the highest and best use of the land. We would be required to determine the fair cash market value of the raw land involved applied to its highest and best use, add to that value the

7. Plaintiffs urge that the building of the tennis courts was ultra vires. We disagree. We think that construction and operation of commercial tennis courts lies within the powers and purposes enumerated in Article III, paragraph 1, of the corporation's articles.

cost of the tennis courts, and see if the value of the developed land equaled the sum of those two amounts. Then, it would be necessary to take into account the fact that the tennis courts are built on land included in a zoning set-back area and defendant Vroom's belief that the developed tennis courts add value to the remainder of the undeveloped land. This is a neat appraisal problem which requires a use study and an appraisal of all of the land owned by the corporation if all of the land be so developed. It is likely that such a study would use at least in part an income approach to value, and this would directly or indirectly take into account the loss history of the tennis courts. The record is not adequate to make any findings in this area, and we leave this for later determination after an appropriate record can be made.

However, this determination will not be made by this Court even upon a later full record. After the decree in this case is implemented [and assuming that a similar result is reached in Ada Rock's case now pending in the state court] the stock of West End Development Company will be owned:

Vroom	33.3353
Irwin	14.8085
Lease	14.8085
Rock	14.8085
McCaleb	11.1091
Crowley	11.1091

This will give plaintiffs and Ada Rock control of 66.64% of the stock. Even without the stock to be awarded to Rock if the state court disagrees with our findings, plaintiffs, and Rock, taking into account Rock's present stock ownership, will control 62.08% of the corporation's

stock. Under these circumstances, the antagonism permitting realignment for diversity purposes would not exist under the rule of Smith v. Sperling, and Swanson v. Traer, supra. By the same token, with the implementation of this decree and plaintiffs' resultant control of the corporation, all of its books and records will be under their direction, and the Court's assistance in forcing an examination of those books and records should not be required. If, after an examination of the corporate books, an accounting appears to be necessary, the jurisdictional antagonism between plaintiffs and the corporation would not exist, and any such proceeding would be for the state courts to handle.

[23, 24] Lastly, plaintiffs ask for an award of attorneys fees for counsels' services in prosecuting the derivative claim. Counsel fees may be and usually are awarded when the attorneys' services result in a pecuniary benefit to the corporation. Trustees v. Greenough (1882) 105 U.S. 527, 26 L.Ed. 1157; McCourt v. Singers-Bigger (1900 8 Cir.) 145 F. 103 [which was a case tried in Colorado]; Slayton v. Missouri Pacific Railroad Company (1968 D.C.Mo.) 279 F.Supp. 525; Mardel Securities, Inc. v. Alexandria Gazette Corporation (1967 D.C.Va.) 278 F.Supp. 1010; and see annotation in 39 A.L.R.2d 580. Attorneys fees should be and they are awarded in this case in the amount of $5,000.00, such fees to be paid by the corporation to counsel for plaintiffs. Of course, the corporation should pay none of defendants' attorneys fees, but if it has done so, this payment should be accounted for in the accounting suit which may follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, DONALD C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the West End Development Company,
Defendants

MOTION FOR ORDER GRANTING RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b) (5) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendant Roy Vroom, by his attorneys, Helmick, Conover & Burkhardt, pursuant to Rule 60 (b) (5) of the Federal Rules of Civil Procedure, moves the Court for an

Order relieving said Defendant from that portion of the Court's Judgment and Decree of May 11, 1972 which impressed a constructive trust upon 30.76 shares of stock of West End Development Company and which ordered and directed said Defendant to transfer said stock to any of said Plaintiffs who tendered purchase prices to said Defendant within thirty days from the date said Judgment became final. As grounds for said Motion, Defendant Roy Vroom states that there has been compliance with the Court's Judgment and Decree, that said constructive trust has been released and that there has accordingly been a satisfaction of that portion of the Judgment which impressed the constructive trust upon the 30.76 shares of stock of West End Development Co. As further grounds, Defendant Roy Vroom also states as follows.

1. In its Judgment and Decree dated and entered on the docket on May 11, 1972, the Court impressed a constructive trust upon 30.76 shares of stock of West End Development Company owned by Defendant Vroom in favor of Plaintiffs Marguerite Irwin, June M. Lease, Julia G. Crowley and Lois M. McCaleb. The constructive trust so impressed for each Plaintiff was expressly conditioned upon the tender by each Plaintiff to Defendant Vroom of a certain amount of money. Each such tender was to have been made within thirty (30) days from the date the judgment became final.

2. Said judgment also provided that if such tenders were not made the constructive trust "shall be released."

3. More than thirty (30) days have elapsed since the

Court's Judgment of May 11, 1972 became final.

4. As is shown by the Affidavits of Defendant Roy Vroom and Frederic K. Conover II, attached hereto as Exhibits "A" and "B", none of the Plaintiffs Marguerite Irwin, June M. Lease, Julia G. Crowley and Lois M. McCaleb, has tendered the amount required by the Court's Judgment and Decree. As a result, there has been full compliance with and a satisfaction of that portion of the Judgment and Decree which imposed the constructive trust, and the constructive trust has been released by the terms of the Judgment and Decree.

5. Although a Notice of Appeal has been filed herein, and the record on appeal filed with the United States Court of Appeals, Tenth Circuit, Action No. 72-1755, this Court has jurisdiction to hear this Motion under Rule 60 (b) of the Federal Rules of Civil Procedure without the necessity of a preliminary petition being filed with the appellate court. *Wilkin v. Sunbeam Corporation*, 405 F.2d 165 (10th Cir., 1968).

DATED this 6th day of November, 1972.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, DONALD C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the West End Development Company,
Defendants

ORDER DENYING RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b) (5)

This matter came on for hearing on Defendant Roy Vroom's Motion for Order Granting Relief from Final Judgment Under Rule 60 (b) (5) of the Federal Rules of Civil Procedure on November 17, 1972. By judgment en-

tered May 11, 1972, the Court impressed a constructive trust upon 30.76 shares of stock of West End Development Company held by the Defendant Roy Vroom conditioned upon tender by the Plaintiffs of certain sums, and provided that "such tender shall be made within thirty days from the date this judgment becomes final, and, if such tender be not made, the trust hereby impressed shall be released."

The subsequent proceedings in this case were recounted by the Court at a hearing on August 18, 1972. The Court's judgment has been appealed to the United States Court of Appeals for the Tenth Circuit.

The parties have stipulated that no tender has been made by the Plaintiffs up to and including November 17, 1972 and that neither the parties nor their representatives ever discussed the question of tender up to and including August 18, 1972. Because of the failure to tender the Defendant Vroom urges that the constructive trust has been released, and the judgment satisfied in that respect. It was the intention of the Court to impose a constructive trust until thirty days after the judgment or order of the final court to which an appeal is taken, and therefore it is

ORDERED, that Defendant Vroom's Motion for Order Granting Relief from Final Judgment Under Rule 60 (b) (5) of the Federal Rules of Civil Procedure be denied.

BY THE COURT:
Fred M. Winner
United States District Judge
Date: November 17th, 1972.

APPROVED AS TO FORM:
William J. Carney
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Nos. 72-1755, 72-1825.

June 29, 1973.

Marguerite IRWIN et al., Plaintiffs-Appellees,

v.

WEST END DEVELOPMENT COMPANY,
a Colorado corporation, et al., Defendants-Appellants.

Rehearing Denied Aug. 17, 1973.

William J. Carney, Aspen, Colo. (J. D. Muller, Aspen, Colo., on the brief), for plaintiffs-appellees.

Frederic K. Conover, II, Denver, Colo., for defendants-appellants.

Before PICKETT, McWILLIAMS, and BARRETT, Circuit Judges.

BARRETT, Circuit Judge

Roy Vroom appeals from the District Court's judgment, 342 F.Supp. 687, impressing a constructive trust in favor of the appellees on 30.76 shares of West End Development Company stock sold to him by the Taylors, together with the Order directing him to pay West End Development Company $15,048.75 of salary and $3,128.24 of interest which he was held to have

wrongfully received. Vroom also appeals from the $5,000 attorneys' fees awarded appellees' counsel.

The appellees are four registered nurses who served in the U.S. Army Nurses' Corps and/or the Veterans' Administration. They were transferred every year or two to stations around the world. Some of them were stationed in Colorado at various times.

In 1957 Marguerite Irwin and Ada Rock, who is not a party to this suit inasmuch as she is now a resident of Colorado and has a similar suit pending in State court against Vroom, went to Aspen, Colorado, to inquire about purchasing a small lodge to operate after their retirement. They visited Vroom Realty. Roy Vroom interested them in joining in the purchase of 30 acres of undeveloped land just outside of Aspen for $45,000. One-half of the $18,000 down payment was tendered by Rock, Irwin and Lease, and the other half by Vroom Realty and Theodore Gordon. Lease, Irwin and Rock then held 20% interest, Vroom Realty, 40% and Gordon, 40%. Vroom Realty and Gordon sold 5% of their interests to Julia Crowley and Lois McCaleb, also registered nurses serving as the other appellees.

A syndicate agreement was entered into in late 1957[1]. It was prepared by Vroom's attorneys, mailed to

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1. The Agreement to Form a Syndicate contained the following language in Article X:

> No party may sell or assign his interest herein or any fractional portion thereof without first offering his interest or fractional portion to the other parties, in writing, and allowing them, or any one of them, 15 days to meet his price, in cash, the name of the proposed purchaser being disclosed. No party shall thereafter sell his interest or any fractional portion thereof to anyone at less than the above offered price. Otherwise the interests or any fractional portion thereof shall be freely assignable.

the nurses and executed by them. In 1963 the syndicate was abandoned and a Colorado corporation known as the West End Development Company was organized by Vroom at the suggestion of his attorneys in Aspen. The nurses consented to the incorporation; however, they were not sent copies of the Articles of Incorporation and, in fact, they did not see them until shortly before trial. Upon incorporation Vroom served as President, Treasurer and Chairman of the Board. Until 1968, the other two directors were Mr. Petre and Mr. Zimmerman, Vroom's attorneys. They also served as secretary and vice-president, respectively. After that time the Board consisted of Vroom and two of his employees. Prior to the closing of the purchase of the property, Vroom assigned 10% of his investment in the syndicate to Mr. and Mrs. Taylor for $10,000 for a loan the Taylors had made to him. He did not inform the other syndicate interest holders of this transaction. In 1958 the syndicate interests and investments were as follows:

	Total Interest in Syndicate	*Initial Cash Investment*
Five Nurses	30%	$ 16,500
Gordon	35%	750
Taylors	10%	10,000
Vroom	25%	9,250

After incorporation, the stock was owned as follows:

Roy Vroom	23.08 shares
Ann Taylor	15.38 shares
Ewing Taylor	15.38 shares
Marguerite Irwin	10.253 shares

June Lease	10.253 shares
Ada Rock	10.253 shares
Julia Crowley	7.69 shares
Lois McCaleb	7.69 shares

In 1961, Gordon, as a result of a partition, received ten acres of the land for his 35% interest in the syndicate.

In September, 1965, the Taylors sold their 30.76 shares to Vroom at $1,025 per share. That same year Vroom offered to buy the five nurses' stock for $600 per share. In 1966 and 1969 Vroom mailed the nurses financial statements reflecting his purchase of the Taylors' stock.

The land appreciated in value due to the development of the Buttermilk Ski Area nearby. Vroom continually requested the nurses to sell their stock at prices substantially lower than their known value; he did not disclose to the nurses the price he paid for the Taylors' stock; he did not state to them that he was personally interested in buying their shares; and he failed to disclose to them the price surrounding land was selling for. In 1968 a site across the street from the subject land sold for $15,000 per acre. At that valuation, attributable to the West End Development Company acreage, each share of stock would have been worth $3,000. That year Vroom stated in a letter to the nurses that they could sell their stock for $800 per share. It is conceded that Vroom is knowledgeable and experienced in land values, land development and land planning.

Vroom's alleged efforts to sell the land did not materialize. He decided to build a Swim and Racket Club

in 1969. Although the shareholders did not consent to the construction of the tennis courts, Vroom proceeded with the construction based upon the approval of the project by the Board of Directors consisting of Vroom and two of his employees. The Board of Directors voted to accept Vroom's loan to the corporation of $39,216.91 with interest at the rate of 9% to construct the courts. Vroom wrote to the nurses about the construction plans. Miss Rock and Miss Irwin went to Aspen to consult with a lawyer. Vroom suggested that they contact the corporation's lawyer, Mr. Helmick. They did so and thereafter executed their powers of attorney relating to their stock to Mr. Helmick.

Also in 1969 Vroom and Powers, Secretary of the Board of Directors, authorized the corporation to borrow $75,000 from the Bank of Aspen to repay Vroom his loan plus interest and to pay a retroactive salary to Vroom of $15,000. Certain of the corporate property was mortgaged to secure the loan. At no time did Vroom inform the shareholders of the salary he had received from the corporation, of the Bank of Aspen's loan to the corporation, or of the interest paid to him. In 1969 the financial statement simply disclosed Vroom's loan to the corporation. The tennis courts lost money in 1970 and 1971.

Vroom contends that: (1) it was error for the trial court to impose a constructive trust on the 30.76 shares which he acquired from the Taylors because Article IV, Paragraph 6 of the Articles of Incorporation is not enforceable; (2) the provisions of Section 15 of the Uniform

Stock Transfer Act barred the trial court's impression of a constructive trust; (3) the imposition of a constructive trust is barred by the statute of limitations and the doctrine of laches; (4) the trial court's application of estoppel was in error; (5) the constructive trust has been released by the expiration of 30 days from the date the judgment became final; (6) the trial court erred in granting judgment against Vroom for salary and interest paid to him; and (7) the trial court's award of attorneys' fees was in error.

I.

Vroom contends that the Court erred in impressing a constructive trust on his stock purchased from the Taylors because Article IV, Paragraph 6 of the Articles of Incorporation is not enforceable. It states:

> No shareholder shall sell or transfer any outstanding shares of the capital stock issued by the corporation to such shareholder, excepting to the other shareholders, in the proportion which the number of shares owned by each bears to the total shares outstanding, without the prior consent of the owners or at least two-thirds (2/3) of the shares entitled to vote at the shareholders' meeting . . .

Vroom alleges that the provision is unintelligible, unworkable, and too uncertain in its terms to be enforced or to give the appellees their pro-rata rights to the purchase of stock sold to Vroom by the Taylors. Substantially the same proviso was incorporated in the Syndicate Agreement. Vroom argues that it is also an unreasonable restraint on the alienation of the corporation stock.

[1, 2] The appellees did not seek to have the Articles of Incorporation specifically enforced, but rather to effectuate the intent of the Articles as a matter of equity in order to prevent fraud. The trial court did not enforce the Articles of Incorporation, but rather the fiduciary duty which the Court found Vroom owed the nurses. The law prohibits an absolute restriction against transferability, but if a restriction does not amount to an effective prohibition against transferability, then the test is reasonableness. Thus, a "first refusal" provision is valid in Colorado. Sterling Loan & Investment Co. v. Litel, 75 Colo. 34, 223 P. 753 (1924). The trial court recognized that the provision contained ambiguities but it construed them against the drafter and gave the provision a reasonable meaning according to Vroom's intent that the Articles should provide a workable and equitable result. The trial court stated that instead of stating "in proportion which the number of shares owned by each bears to the total shares outstanding", the draftsman meant to state, "in the proportion which the number of shares owned by each bears to the total shares not offered for sale." Vroom was, or should have been, well aware of the provisions contained in the Articles of Incorporation. He should have offered the Taylors' stock to the nurses on a pro-rata basis before purchasing it entirely for himself. The nurses were not aware of their right to purchase the Taylor stock until they saw the Articles in 1970. They relied on Vroom's judgment, honesty and fair dealing. Vroom owed a fiduciary duty to them. He breached this duty in not offering them their proportion of the Taylor stock. A constructive trust was imposed by the trial court

because Vroom would be unjustly enriched by being permitted to keep the 30.76 shares. The trust arose because of unconscionable conduct by Vroom in obtaining the shares from the Taylors for his sole benefit. McConnell v. Dixon, 68 Wyo. 301,233 P.2d 877 (1951).

II.

Vroom contends that the provisions of Section 15 of the Uniform Stock Transfer Act barred the trial court's impression of a constructive trust upon the Taylor stock. It states:

> There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaw of such corporation, or otherwise, unless the right of the corporation to such a lien or the restriction is stated upon the certificate. 1963 C.R.S. 31-11-14.

Vroom alleges that the effect of the statute is to render ineffective the restrictive provisions of Article IV, Paragraph 6 of the Articles of Incorporation because the restrictions were not set forth upon the stock certificates sold by Taylors to Vroom.

[3, 4] Section 15 of the Uniform Stock Transfer Act was superseded by 1963 C.R.S. 155-8-204 which states:

> Unless noted conspicuously on the security, a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it.

The purpose of Section 31-11-14 was to make ineffective restrictions on transfers to persons without notice. Sankin v. 5410 Connecticut Avenue Corporation, 281 F.Supp. 524 (D.D.C.1968), aff'd, 133 U.S.App.D.C. 361, 410 F.2d 1060 (1969), cert. denied 396 U.S. 1041, 90 S.Ct. 681, 24 L.Ed.2d 685 (1970). The failure to note the restriction on the certificates is no bar to its enforcement against Vroom who had actual notice of it. The trial court went further and stated that in any event, Vroom is estopped from setting up the absence of the restriction from the face of the stock certificate as a defense, inasmuch as he owed a fiduciary duty to the other stockholders. Vroom breached his contractual and fiduciary duties to the appellees when he purchased the Taylor stock without honoring the agreement he had previously made to permit the other stockholders to share in the purchase. The only equitable solution is the one the trial court arrived at, i.e., the imposition of a constructive trust on the 30.76 shares of stock purchased by Vroom from the Taylors. In this regard, we note that Vroom will share on a pro-rata basis, notwithstanding his breach.

III.

Vroom alleges that the statute of limitations and the doctrine of laches bar this action. All parties agree that 1963 C.R.S. 87-1-15 applies, which is a five-year limitation on bills of relief. Vroom alleges that since the Taylor sale of stock occurred no later than September 15, 1965, the five-year limitation expired on September 15, 1970, some five months before the suit was filed. Vroom further alleges that even if the appellees are not barred by

the statute of limitations, they are barred by the doctrine of laches, because they took no interest in the project for five years while Vroom was devoting substantial time to the development of the property.

[5-7] The actual sale of the Taylor stock to Vroom was concealed from the stockholders until Vroom sent the 1965 financial statement on March 7, 1966, within the five-year statute of limitations. Even so, when the nurses learned of the sale of Taylors' stock to Vroom they had no reason to object because they were unaware of the restriction on its sale. They had no knowledge of the restriction until they received copies of the Articles of Incorporation in 1970. Thus the statute of limitations could not begin to run until the appellees knew in 1970 of the trust which Vroom violated. Cliff v. Cliff, 23 Colo.App. 183, 128 P. 860 (1912). There is no distinction between resulting trusts and constructive trusts as far as laches and the statute of limitations is concerned. Vandewiele v. Vandewiele, 110 Colo. 556, 136 P.2d 523 (1943). Laches is not a valid defense. The nurses brought the action soon after learning of Vroom's breach of trust. The elements of laches are full knowledge of the facts, unreasonable delay in asserting an available remedy, and intervening reliance by and prejudice to another. Herald Company v. Seawell, 472 F.2d 1081 (10th Cir. 1972). The elements are not present here.

IV.

Vroom next asserts that the trial court's attempts to avoid the effects of the statute of limitations and the Uniform Stock Transfer Act by invoking the doctrine of estoppel was in error. Vroom contends that since the

issue of estoppel was not raised in the pleadings or the pretrial order, and must be pleaded specially, the Court could not rule or rely thereon.

[8-10] Estoppel arises here not as an affirmative defense, but as a reply to an affirmative defense. It need not be pleaded specially. The trial court is obligated to determine the issues presented by the evidence properly before it. Issues will be treated as if they had been raised by the pleadings when they are tried by the implied consent of the parties. Knudson v. Boren, 261 F.2d 15 (10th Cir. 1958). Since Vroom introduced the evidence forming the basis for the estoppel, he cannot now complain.

V.

Vroom alleges that the constructive trust has been terminated by the expiration of 30 days from the date the judgment became final because appellees did not tender payment of their pro-rata share of the Taylor stock as required by the judgment. Vroom contends that the judgment became final ten days after the entry of the trial court's judgment.

[11, 12] The general rule is that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties, so the party who is to perform the condition has the specified time starting from the time that the appellate court judgment becomes effective to perform the condition. 4 Am.Jur.2d, Appeal & Error § 363. This court recognized the rule in First National Bank in Dodge City v. Johnson County National Bank and Trust Company, 331 F.2d 325 (10th Cir. 1964), where we said that a final

and appealable order is one which terminates the litigation between the parties on the merits of the case and on affirmance the trial court will have nothing to do but execute the judgment it originally entered. See Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), cert. denied 400 U.S. 1000, 91 S.Ct. 459, 27 L.Ed.2d 451 (1970); Rule 62 (a), Fed.R.Civ.P., 28 U.S.C.A.; 28 U.S.C.A. §§ 1291-1294. Thus the appeal suspended the time for performance by the nurses of tendering payment for the shares of stock available to them through the imposition of the constructive trust on the Taylor stock. They must tender payment only after the judgment from this court becomes effective.

VI.

Vroom next contends that the trial court erred in granting judgment against him for salary and loan interest paid to him. Vroom alleges that his salary and the interest paid to him are authorized under the "business judgment" rule and were also permitted under the provisions of Article VIII, Paragraph 1 of the Articles of Incorporation.

[13-16] The Articles of Incorporation do not authorize salaries to be paid to the directors or officers. Vroom's salary was paid by a loan from the Bank of Aspen at a time when the corporation had no operating funds. The directors, in fixing their salaries, must consider the financial condition of the corporation. Glenmore Distilleries Company v. Seideman, 267 F.Supp. 915 (E.D.N.Y. 1967). Retroactive salaries are voidable where no extraordinary services are performed. Vroom's compensation was already set at $14 per regular meeting, $25

per special meeting; no further compensation was authorized without shareholder approval. His salary was approved by a resolution signed by himself and his secretary who was on the Board of Directors. Since Vroom's presence and vote were necessary to provide a quorum of directors, the transaction is voidable; he cannot vote for his own salary. Steele v. Gold Fissure Gold Mining Co., 42 Colo. 529, 95 P. 349 (1908). Vroom's loan to the corporation and the interest he received, together with the retroactive salary, constituted a breach of his fiduciary duty; he could not profit at the expense of other stockholders. Wilshire Oil Company of Texas v. Riffe, 381 F.2d 646 (10th Cir. 1967), cert. denied 389 U.S. 822, 88 S.Ct. 50, 19 L.Ed.2d 75 (1967). He had assured the shareholders that the tennis courts would cost nothing to the corporation. Such, of course, was not the case.

VII.

[17] Vroom argues that the trial court's award of attorneys' fees of $5,000 by West End Development Company to appellees' counsel was in error because the appellees had not requested attorneys' fees and because there was no evidence presented as to the incurring or reasonableness of the fees. Attorneys' fees may be granted only if evidence is introduced establishing the value of the services performed. Del Rey Air v. Expressway Airpark, Inc., 468 F.2d 187 (10th Cir. 1972). No evidence was introduced regarding the value of the attorneys' services. Accordingly, the award must be set aside.

The judgment awarding attorneys' fees is reversed; the judgment is otherwise affirmed.